Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

October Term, 1998

HOLLY GOTTFRIED,

Petitioner,

vs.

MEDICAL PLANNING SERVICES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Sixth Circuit be allowed to establish a new rule requiring Pullman abstention where a member of the general public brings a First Amendment challenge to a state court provision which is clear, unambiguous, and facially invalid, and the only issue presented is one of federal law?

2. Should the Sixth Circuit be permitted to impose an exhaustion requirement as a precondition to a § 1983 suit, requiring a member of the general public whose speech on a public sidewalk is barred by a state court provision, which is unconstitutional on its face, to first file suit in state court to see if the state court will rewrite the unconstitutional provision to eliminate the federal unconstitutionality?

3. Should a federal court invoking Pullman abstention be permitted to stay a § 1983 action involving a facially unconstitutional state provision, which is causing an immediate deprivation of First Amendment rights, without first considering whether preliminary injunctive relief is required?

4. May a court issue an injunction that expressly binds the entire world?

5. Should an injunction that expressly binds the general public be treated as a statute?

6. Should a court be permitted to issue a complete ban against picketing on a public sidewalk in a non-residential setting?

7. Should the Sixth Circuit Opinion be permitted to stand when it is in conflict with the rulings of other Circuits as follows:

- It expands Pullman abstention to require a person to turn first to a state remedy, not to clarify any ambiguity or unclear issue of state law, but to correct federal unconstitutionality.

- It extends the abstention doctrine to cases of unambiguous, facial unconstitutionality under federal law.

- It imposes not abstention, but an exhaustion of state remedies requirement as a precondition to Section 1983 relief, despite the lack of any state law issue and the presence solely of a federal law question.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Defendants Offices of Manohar Lal, M.D.; Manohar Lal, M.D.; County of Summit, Ohio; Summit County Sheriff Richard Warren; and the Honorable Jane Bond, Judge of the Summit County Court of Common Pleas, were parties before the United States Court of Appeals for the Sixth Circuit.

Defendants Medical Planning Services, Inc.; Office of Manohar Lal, M.D.; and Manohar Lal, M.D. are sometime collectively referred to as "the Lal Defendants" or the "MPS Defendants."

Defendants County of Summit, Ohio; Summit County Sheriff Richard Warren; and the Honorable Jane Bond, Judge of the Summit County Court of Common Pleas are sometimes collectively referred to as "the Summit County Defendants".

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APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Sixth Circuit, filed April 16, 1998.

Appendix B — Opinion of the United States District Court for the Northern District of Ohio, filed December 20, 1996.

Appendix C — Rehearing Opinion of the United States Court of Appeals for the Sixth Circuit, filed July 10, 1998.

Appendix D — Permanent Injunction entered by the Court of Common Pleas, Summit County, Ohio, on August 7, 1986.

Petitioner, Holly Gottfried, respectfully requests that a writ of certiorari be issued to review the judgment of the United State Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

United States Court of Appeals for the Sixth Circuit Opinion:

> Gottfried v. Medical Planning Services, Inc., 142 F.3d 326 (6th Cir. 1998). (Apx. A).

United States District Court for the Northern District of Ohio, Eastern Division, Opinion:

> Gottfried v. Medical Planning Services, Inc., No. 5:95CV1569, unreported (N.D. Ohio, Dec. 20, 1996). (Apx B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") was entered on April 16, 1998. The Sixth Circuit denied a timely petition for rehearing on July 10, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Rule 65 (and its equivalent state law provisions) limits an injunction to the named parties; their representatives; and persons in active concert and participation with them ("their privies"). The last decade has seen a wave of a "new breed" of injunctions, entered by frustrated state court judges in response to picketing activities on a variety of subjects. These new "injunctions" go beyond those limits, to expressly include a fourth category – all the world. They close public sidewalks and other traditional public forums off completely, prohibiting even the general public

from engaging in peaceful, lawful free speech activities.

As permanent injunctions, these complete bans in speech remain on the books indefinitely -- not fallow, but coiled and ready to strike.

These increasingly common provisions raise four basic issues:

1. Is it constitutional under the due process clause, in the first instance, for a state court to ever enter an injunction which expressly binds all the world?

2. What remedy does a non-party stranger have against such a direct, immediate bar of their free speech rights on a public sidewalk? Is § 1983 relief available directly from a federal court; or, should a new variety of abstention be created to require the victim to turn first to the state court system?

3. Should these injunctions, which expressly operate identical to a statute, be treated and analyzed as a statute?

4. May these speech bans be used to extend the rule of Frisby v. Schultz to non-residential settings, so as to establish complete speech-free zones against everyone on public sidewalks in non-residential areas?

In Madsen v. Womens Health Services, many of these questions were raised and superficially discussed by the U.S. Supreme Court, but the issue could not be joined because the Madsen injunction had only been "construed" to apply to the entire world. It did not expressly contain such a provision.

The present injunction does. It is one of the now-common injunctions expressly containing an "all the world" provision. It therefore presents the critical questions raised but unreachable in Madsen: whether a court may ever enter an injunction consistent with due process which binds "all the

world"; and, if so, should the constitutionality of such a provision be analyzed like a statute?

At the same time, this case presents an even more important, threshold question which critically affects § 1983 litigation: should the "abstention" doctrines announced by this Court now be expanded to require a person suffering a direct and immediate violation of their constitutional rights to first seek relief in state court before a federal court will act. Put more bluntly, when confronted with a clear, unambiguous and facially unconstitutional state provision, does this Court intend Pullman abstention to be used, on the ground that state judges are "equal to the task" of addressing federal constitutional claims?

This case involves the right of a nonparty stranger to a state court injunction which is clear, unambiguous and facially unconstitutional to bring a First Amendment challenge in federal court under 42 U.S.C. § 1983 without having to resort to state court first.

The underlying facts are straight-forward and undisputed, and they were set out in the Sixth Circuit's Opinion, 142 F.3d 326.

In 1985, Dr. Manohar Lal, his OB/GYN office, and Medical Planning Services, Inc. (which operates the clinic at which Dr. Lal performs abortions), sought a permanent injunction against certain anti-abortion protest activities occurring in Akron, Ohio. A permanent injunction was issued by the Court of Common Pleas in Summit County, Ohio in 1986. The injunction applies not only to the named defendants, and "any and all persons acting in concert or participation with them", as allowed by Rule 65. By its express terms it also applies to "all other persons to whom notice of [the injunction] shall come."

The parties stipulated (Stip. ¶12) and the lower courts found[1] that it prohibits members of the general public from engaging in any type of peaceful, lawful speech on the public sidewalks adjacent to Dr. Lal's home, office, and clinic, even if they had nothing to do with the original lawsuit. As the district court judge indicated — this injunction bans me from picketing on that sidewalk. A copy of the injunction is set forth in Appendix D.

It is now more than thirteen years since the injunction was permanently entered, and the case closed. All proceedings in the state court concluded in 1986. All that now remains is the bare injunction on the books.

Holly Gottfried was ten years old, and she lived over 100 miles away, when the Akron state court injunction was entered. She is acknowledged to be a complete stranger to the injunction. Gottfried moved to Akron in September 1994 to attend college. As a pro-lifer, she wanted to peacefully picket, distribute literature and engage in other free speech activities on the public sidewalks adjacent to Dr. Lal's home, office, and clinic.

It was stipulated by the parties (Stip. ¶11) and found by the lower court[2] that Gottfried's picketing would be entirely peaceful and lawful. Despite this, the Summit County Defendants -- the Sheriff, the County of Summit, and the Common Pleas Court (Judge Jane Bond) -- stipulated that unless and until they are restrained by order of a federal court, or the injunction is declared unconstitutional by a federal court, they will enforce the injunction by all appropriate means, including arrest and detention. (Stip. ¶16-17).

Gottfried therefore filed suit in the United States District Court (N.D. Ohio) pursuant to 42 U.S.C. § 1983 against Dr.

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[1] District Court Finding, ¶10; Sixth Circuit Opinion, 142 F.3d at 328 ("It prohibits anyone from picketing").

[2] District Court Finding, ¶ 44, 45.

Manohar Lal, his OB/GYN Clinic, Medical Planning Services, Inc., Judge Jane Bond (the state court judge), the County of Summit, and Summit County Sheriff Richard Warren. Jurisdiction was based on 28 U.S.C. §§1331, 1343. The suit solely challenged the portions of the injunction which ban the general public from undertaking lawful, peaceful expression on public sidewalks. Gottfried sought to have the District Court declare the injunction unconstitutional on its face as violative of her First Amendment rights.

The Defendants moved to dismiss the case under the Anti-Injunction Act, Colorado River abstention, and the Rooker-Feldman doctrine. The District Court found none of these doctrines, nor any known abstention principle, to apply. It nonetheless dismissed the case "in the interest of state-federal comity concerns," refusing to address the conceded facial unconstitutionality of the injunction. Gottfried appealed to the Sixth Circuit.

The Sixth Circuit Opinion, 142 F.3d 326, reversed the dismissal, but affirmed the abstention. It achieved this "middle ground" by inventing a new brand of abstention and deferral, allegedly under Pullman.

Specifically, after noting the significant confusion in this area of law, the Sixth Circuit canvassed all of the recognized abstention doctrines allowed by this Court (e.g., Anti-Injunction Act; Younger; Colorado River; Rooker-Feldman). It found every one of them inapplicable, because Gottfried was a complete stranger and there were no pending proceedings -- the only thing remaining was a classic example of the now unfortunately common "all the world" injunctions which operates like a statute against the general public.

The Sixth Circuit therefore invented a new abstention and deferral doctrine, claiming entitlement to do so under Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). Pullman "deferral" had been limited to "uncertain" state

provisions or unsettled questions of state law. Here, it is stipulated and found by both lower courts that the unconstitutional provision was clear and unambiguous. The new abstention created by the Sixth Circuit was not to construe ambiguities or issues of state law, but to correct an unambiguous federal constitutional infirmity.

The Sixth Circuit acknowledged this new doctrine it invented was not abstention at all: it was a requirement of exhaustion of state remedies -- a member of the public bringing a § 1983 action must first file a new lawsuit in state court in the form of "an original action in prohibition . . . [or one for] general declaratory relief", and the District Court must stay the § 1983 action indefinitely until "after she exhausts her remedies in the state court." Gottfried, 142 F.3d 332-333.

The Sixth Circuit grounded its new doctrine on the concept that state court judges are "equal to the task" of addressing federal constitutional rights. Id. That, of course, does not address the question presented to this Court-- whether a litigant who is expressly given a right by Congress under § 1983 to vindicate their federal rights directly in federal court should lose that immediate, direct choice of forum based on this newly created judicial abstention rule.

The Sixth Circuit's Opinion denies Gottfried and the general public whose speech is foreclosed on those public sidewalks the opportunity to obtain direct, immediate, federal relief under § 1983 for violation of their First Amendment rights.

Certiorari should be granted because the Sixth Circuit's Opinion drastically conflicts with established law of this Court and other Circuits concerning Pullman abstention and the availability of § 1983 relief.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THERE IS AN INTER-CIRCUIT CONFLICT ON WHETHER PULLMAN ABSTENTION MAY BE USED WHERE THE CHALLENGED PROVISION IS FACIALLY UNCONSTITUTIONAL, THERE IS NO AMBIGUOUS OR UNCLEAR QUESTION OF STATE LAW, AND THE ONLY ISSUE PRESENTED IS ONE OF FEDERAL LAW.

Holly Gottfried's petition for certiorari should be granted because the opinion below, in conflict with decisions of other Circuits, eliminates a critical qualification of Pullman abstention which requires that a challenged provision present an ambiguous and unclear issue of state law and be susceptible to an interpretation that would obviate the federal issue involved. See e.g., Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1491-1492 (5th Cir. 1995); Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2nd Cir. 1995); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1126 (8th Cir. 1982).[3]

The Sixth Circuit has taken Pullman abstention beyond permissible bounds, so that even where a state court order is clear and unambiguous, and represents no state law question, and despite the fact that an immediate deprivation of federal constitutional rights is occurring, a federal court must nonetheless stay the federal action until Plaintiff prosecutes new action in state court to rewrite the unconstitutional provision. Gottfried, 142 F.3d 326. This wholesale change in abstention law, which creates an exhaustion requirement as a precondition to a § 1983 action, cannot be allowed to stand.

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[3] Also see, United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588, 593 (2nd Cir. 1989).

The United States Supreme Court has admonished lower federal courts that the doctrines of abstention are "'extraordinary and narrow'" exceptions to the "virtually unflagging obligation . . . to exercise the jurisdiction given them." See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 14 (1983) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-817 (1976)).

The Sixth Circuit has failed to heed this warning.

Instead, it has invented a new abstention doctrine which conflicts with rulings of other Circuits which have held that Pullman abstention is only available when there is an ambiguous or unsettled question of state law. See Louisiana Debating, 42 F.3d at 1491-1492 (5th Cir.); United Fence, 878 F.2d at 594 (2nd Cir.); National City Lines, 687 F.2d at 1126 (8th Cir.).[4]

In McKusick v. City of Melbourne, Fla., 96 F.3d 478 (11th Cir. 1996), the Eleventh Circuit made clear that where a challenged state provision is not ambiguous, abstention and deferral may not be used. As the court stated:

> [W]here an injunction is attacked on First Amendment grounds and is facially overbroad, abstention for comity and federalism reasons is inappropriate . . . Moreover, [this] is consistent with the abstention principles announced by the Supreme Court. See, City of Houston, Tex v.

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[4] When faced with a provision which is facially invalid, a district court is not authorized to send the matter down to the state court system, requiring the victim to commence a declaratory judgment or other proceedings there, merely to see if the state court can find some possible issue of state law. "[T]he extraordinary decision to stay federal adjudication requires more than a [possible] ambiguity in state law and likelihood of avoiding constitutional adjudication." Louisiana Debating, 42 F.3d at 1491-92. The district court must specifically identify an obvious issue of ambiguity whose resolution will likely avoid entirely the federal constitutional infirmity being asserted in the § 1983 action. Here, it is conceded that there is none.

> Hill, 482 U.S. 451, 467, 107 S. Ct. 2502, 2513, 96 L. Ed. 2d 398 (1987)("we have held that 'abstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression.'").

McKusick, 96 F.3d at 489 (alterations in original).

In direct conflict with the Eleventh Circuit rule prohibiting abstention, the Sixth Circuit requires abstention, despite the state provision presenting no ambiguity or state law question, and being facially contrary to the First Amendment.

In Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969), the Fifth Circuit addressed an injunction, similar to the present, which prohibited "all picketing" in certain public areas of a city. Members of the general public who desired to picket in these public areas brought suit in federal court seeking declaratory and injunctive relief against enforcement of the state court injunction. Id. at 284. The district court denied relief and dismissed the complaint on comity and federalism grounds. Id. After holding that principles of comity must yield to the paramount interests protected by the First Amendment, the Fifth Circuit reversed and remanded the case to district court to address granting injunctive relief from the facially overbroad state court injunction. Id. at 290. The court explained:

> "We hold that the state court injunction here is unconstitutionally overbroad in that it lumps the protected with the unprotected in such a way as to abridge important public interests in the dissemination of public expression on public issues."

Id.

In direct conflict with the Fifth Circuit, the Sixth Circuit requires a District Court to abstain from granting a non-party relief from a facially unconstitutional provision, relying on

principles of federalism and comity, even though there is an immediate deprivation of First Amendment rights.

The challenged provision of the instant injunction is conceded to be facially unconstitutional.[5] The challenged provision, unambiguously on its face, bans peaceful, lawful speech by the general public on a public sidewalk.[6] Moreover,

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[5] Both the district court (Finding, ¶11) and the Sixth Circuit recited the same clearly in their Opinions: "The injunction prohibits anyone from picketing at [the public sidewalks adjacent to] Dr. Lal's home and his OB/GYN office." Gottfried, 142 F.3d at 328.

The parties have stipulated that the challenged state enactment is neither ambiguous, unclear, nor "open to interpretation." On its face it bans everyone from even peaceful, lawful forms of expression on the public sidewalks involved. Stip. 11; and see District Court Findings ¶11 and ¶44; and Sixth Circuit Opinion, 142 F.3d at 328. Hence, since "the naked question, uncomplicated by [ambiguous language], is whether the [state provision] on its face is unconstitutional," abstention or deferral from federal jurisdiction is inappropriate. Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971).

[6] For over three years, the state officers including the state court judge were Defendants in the 42 U.S.C. § 1983 suit before the District Court. The constitutional objections to this injunction were raised there and the Defendant state court judge and sheriff were fully aware of them; yet, they refuse to eliminate the unconstitutional provisions of the injunction. (Stip. 16-17; Apx. p. 218) (Unless and until restrained by federal court, the County of Summit, the state court judge, and the state court will enforce the injunction by arrest and detention).

Pullman deferral may not be granted where there is full awareness of the constitutional objections but no correction is made to them. City of Houston, Tex. v. Hill, 482 U.S. 451, 470 (1987):

> [T]he claim that the courts have not had an opportunity is misleading [for they] have had numerous opportunities to narrow the scope [and] there is no evidence they have done so. In fact, the city's primary position throughout this litigation has been "to insis[t] on the validity of the ordinance as literally read". It would be manifestly inappropriate to [abstain] where, as here, there is no uncertain question of state law[.] A federal court may not properly ask a state court if it would care in effect to rewrite [the provision].

this Court has held that such a provision, which on its face expressly applies to the entire world and bans everyone from the exercise of peaceful speech on a public sidewalk, is facially unconstitutional. U.S. v. Grace, 461 U.S. 171 (1983).

Where a state provision is attacked on its face as repugnant to the First Amendment, "it is the duty of a federal court to decide the federal question when presented to it." Zwickler v. Koota, 389 U.S. 241, 251 (1967). As the Second and Fifth Circuits have recognized, where policies of federalism and avoidance of unnecessary constitutional adjudication, supporting Pullman abstention, collide with the paramount interests protected by the First Amendment, comity must yield. United Fence, 878 F.2d at 593; Machesky, 414 F.2d at 291.

The Sixth Circuit has now conflicted with those Circuits, consigning a victim instead to state court. It did so upon the notion that a state court judge is "equal to the task" of protecting federal constitutional rights. Gottfried, 142 F.3d at 333.

The question thus presented to this U.S. Supreme Court is as simple as it is monumental: may a federal court faced with a § 1983 challenge to a facially unconstitutional state provision which is unambiguous and presents no questions of state law, defer to state court under Pullman? The Sixth Circuit says yes. The Second, Fifth, and Eleventh Circuits say no.

Requiring a district court to abstain from granting a nonparty relief from an unconstitutionally overbroad injunction, which creates an immediate deprivation of First Amendment rights, turns the doctrine of federalism "on its head." See Steffel v. Thompson, 415 U.S. 452, 472 (1974). Yet, the Sixth Circuit has now created a new abstention doctrine in such cases.

As it stands, persons in Ohio, Michigan, Kentucky and Tennessee are subject to a new branch of Pullman deferral which requires abstention even where a state provision is unambiguous and facially unconstitutional, not to resolve an ambiguity of state

law but to correct federal unconstitutionality. Persons in other Circuits who are subject to an identical provision are entitled to immediate relief in federal court from a clear violation of their federal constitutional rights.

In conclusion, the Sixth Circuit has created a new brand of Pullman abstention, without the U.S. Supreme Court authorizing it, and in conflict with other Circuits. It did so on the reasoning that the state court judges are "equal to the task" of handling federal constitutional issues. However,

> Congress could, of course, have routed all federal constitutional questions through the state court system, saving to this Court the final say when it came to review of the state court judgments. But our First Congress resolved differently and created the federal court system and in time granted the federal courts various heads of jurisdiction, which today involved most federal constitutional rights.

Wisconsin v. Constatineau, 400 U.S. 433, 437-438 (1971) (footnotes omitted).

This Court should grant Holly Gottfried's petition so that it may correct this inter-circuit conflict over the permissible reaches of Pullman abstention. It should also grant review because the court below has invented a new and improper restriction on the duty of federal courts to exercise the jurisdiction given them, where federal constitutional rights are being immediately violated.

II. THE PETITION SHOULD BE GRANTED BECAUSE THERE IS AN INTER-CIRCUIT CONFLICT ON WHETHER AN EXHAUSTION REQUIREMENT MAY BE IMPOSED AS A PRECONDITION TO A SECTION 1983 SUIT INVOLVING A NONPARTY TO A FACIALLY UNCONSTITUTIONAL STATE COURT ORDER.

Holly Gottfried's petition for certiorari should be granted because the Sixth Circuit's decision imposes an exhaustion requirement as a precondition to a § 1983 suit, in conflict with this Court's prior rulings and the opinions of other Circuits. See e.g., Patsy v. Board of Regents, 457 U.S. 496, 512 (1982); Mitchum v. Foster, 407 U.S. 225 (1972); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1960); Wilbur v. Harris, 53 F.3d 542 (2nd Cir. 1995); Thomas v. Texas State Bd. of Medical Examiners, 807 F.2d 453, 456 (5th Cir. 1987); Miofsky v. Superior Court of California, 703 F.2d 332 (9th Cir. 1982).

Under the Sixth Circuit's ruling, a member of the general public whose free speech is denied by an unambiguous, facially invalid state court order must first file suit in state court seeking a rewrite of the provision to bring it into compliance with the Federal Constitution, before obtaining relief under § 1983 in federal court. This is not Pullman abstention, but an exhaustion of state judicial remedies requirement, plain and simple.

Indeed, the Sixth Circuit concedes this in its Opinion -- a victim is precluded from obtaining direct, immediate relief in "federal court for determination of the merits of her constitutional claim [until] after she exhausts her remedies in state courts." Gottfried, 142 F.3d at 333 (emphasis added).[7]

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[7] The instant case was remanded under Pullman for the stated reason that such remand would "give the state judge the first chance to bring the injunction into compliance with constitutional law." Gottfried, 142 F.3d at 330.

This Court has previously held that exhaustion of state administrative remedies cannot be required as a pre-condition to an action under § 1983. E.g., Patsy, 457 U.S. at 512; Monroe, 365 U.S. at 183. Does that mean only state administrative remedies, or equally state judicial remedies?

In issuing its ruling, the Sixth Circuit was not simply misconstruing its own prior opinions, or prior opinions of this Court. The Sixth Circuit decided to use Pullman to create a new exception to Patsy/Monroe where the unconstitutional state provision originates from the judiciary, rather than from legislation, executive order, or municipal ordinance.

Did this Court intend Pullman to be available to create this new exhaustion of state remedies requirement? The Circuits are in notable conflict on this point.

In Thomas, 807 F.2d at 454, the Fifth Circuit held that "exhaustion of state remedies is not required as a prerequisite to § 1983 cases." As stated by the Fifth Circuit:

> A federal court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," Chief Justice Marshall wrote for the Supreme court in Cohens

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The problem is, Ohio law does not allow this. State ex rel News Herald v. Court of Common Pleas, 77 Ohio St. 3d 40, 43, 671 N.E.2d 5, 8 (Ohio 1996).

Under Ohio law, Ms. Gottfried, a non-party and stranger, may not seek relief from the judge having authority over this injunction, nor from the Summit County Common Pleas Court. Rather, a separate lawsuit must be filed in the Ohio Court of Appeals or Ohio Supreme Court for an extraordinary Writ of Prohibition. That is the only route available:

> "Prohibition is the only remedy available to non-parties who wish to challenge an Order which restricts the rights of free speech and press of such non-parties."

News Herald, 77 Ohio St. 3d at 43, 671 N.E.2d at 8 (emphasis in original).

> v. Virginia 165 years ago. While this dictum does not state an inexorable rule, and federal courts yield jurisdiction to state courts when necessary to support constitutional principles of federalism and attendant respect for state court jurisdiction, it contains a basic precept that still commands attention. Federal courts must not abdicate the decision of federal questions.

Id.

In Wilbur, 53 F.3d 542, the Second Circuit held that Pullman should not be extended as a mechanism for imposing an exhaustion requirement in a § 1983 action:

> The district court may have viewed its decision as an exercise of Pullman abstention that would allow . . . a state . . . court to consider the merits of Wilbur's labor relations claim. Pullman, however, only applies where state law is uncertain, and a state court's clarification of the uncertain law could obviate the need for a federal constitutional ruling. In summary, abstention in the instant case is squarely at odds with the holding in Patsy that exhaustion of state administrative remedies is not required in a Sec. 1983 action.

Id. at 545 (citations omitted). But, the Second Circuit's holding deals with "state administrative remedies." Thus, the question that remains unanswered and which is now presented for certiorari is whether the same holds true for "state judicial remedies." The Sixth Circuit says no. The Ninth Circuit says yes.

In Miofsky, 703 F.2d at 335, the Ninth Circuit held that a victim has a right to bring a § 1983 action in federal court regardless of the fact that the state action allegedly violating a

person's federally protected rights is of a judicial nature.[8] As the Ninth Circuit noted, "we know of no ground for exempting from the broad reach of § 1983 actions taken by persons acting under color of state law in judicial proceedings, whether those persons are judges or others appointed by judges to act on behalf of the court." Id.

The U.S. Supreme Court has declared that a § 1983 action may be brought in federal court against actions of a state judiciary which allegedly deprive a person of rights protect under the United States Constitution. Mitchum, 407 U.S. 225. Indeed, this Court has exclaimed that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" Id. at 242 (emphasis added).

It is respectfully submitted that using Pullman to impose an exhaustion requirement in this area would disregard decades of careful line drawing by this Court in its abstention jurisprudence. Notably, the Sixth Circuit canvassed all of the permitted bases for abstention (Younger, Colorado River, etc.) and found none of them could apply.

Where the carefully crafted abstention doctrines announced by this Court do not apply, a lower court does not have the authority to impose a new form of abstention –

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[8] In Miofsky, Miofsky brought a § 1983 action in federal court alleging that the state courts, by denying his request for a protective order, had deprived him of certain rights guaranteed by the United States Constitution. 703 F.2d at 334. The district court dismissed the action for lack of subject matter jurisdiction reasoning that it was inappropriate for a lower federal court to review a decision of a state court. Id. The Ninth Circuit reversed, citing to Mitchum, 407 U.S. at 242, wherein this Court held that a suit could be brought in federal court under § 1983 regardless of whether the allegedly unconstitutional state action is executive, legislative, or judicial in nature. Miofsky, 703 F.3d at 335.

masquerading in the guise of an exhaustion requirement -- simply because the facially unconstitutional state provision emanates from the judiciary, and not a legislative enactment, executive order, or municipal ordinance.

The injunction here is one of the now-common variety -- expressly written to operate as a statute, lurking on the books and expressly banning the entire world from peaceful, lawful free speech on public sidewalks.

A member of the general public who challenges such a provision is no differently situated than a member of the general public who challenges an unconstitutional state statute, municipal ordinance, or executive order, which bans the identical speech at an identical location.

Yet under the new requirement created by the Sixth Circuit's Opinion, where a state injunction properly bans named, violent black activists from unlawful conduct, but also closes public sidewalks to peaceful speech by the general black and white public, a member of that general public must file suit in state court to challenge whether the injunction is "necessary", even though the challenged provision is plainly and facially unconstitutional from the outset. A member of that general public must file a lawsuit in state court to protect their First Amendment right as a pre-condition to § 1983 relief.

Requiring a victim to commence suit in state court so that the state can rewrite the unconstitutional provision is not a Pullman clarification of ambiguity, but an exhaustion of state judicial remedies.

> "A federal court may not properly ask a state court if it would care in effect to rewrite [the unconstitutional provision]."

City of Houston, 482 U.S. at 471:

> Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred special categories of jurisdiction upon the federal courts, and with the principal that `When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . The right of a party Plaintiff to choose a Federal court where there is a choice cannot properly be denied.

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415 (1964).

Thus, the question presented for certiorari is whether the new rule invented by the Sixth Circuit should fill the gaps in this Court's prior opinions. Under this new Sixth Circuit requirement, persons in the Sixth Circuit are barred from obtaining immediate redress in federal courts from the deprivation of their federal constitutional rights, while persons in other Circuits continue to be entitled to proceed directly to federal court for relief from the violation of fundamental rights. Holly Gottfried's petition should be granted so that this Court can correct this dangerous and improper exhaustion requirement that the Sixth Circuit has used Pullman to create.

III. THE PETITION SHOULD BE GRANTED BECAUSE THERE IS AN INTER-CIRCUIT CONFLICT ON WHETHER A FEDERAL COURT PRESENTED WITH A STATE PROVISION WHICH IS FACIALLY UNCONSTITUTIONAL AND CAUSING IMMEDIATE LOSS OF FIRST AMENDMENT RIGHTS SHOULD CONSIDER GRANTING PRELIMINARY INJUNCTIVE RELIEF *BEFORE* INVOKING PULLMAN ABSTENTION.

Holly Gottfried's petition for writ of certiorari should be granted because the opinion below conflicts with the rulings of this Court and of other Circuits concerning the duty of a federal court to address a victim's right to seek immediate and direct relief from a federal court under § 1983 from a clear violation of their constitutional rights. See e.g., Patsy, 457 U.S. at 512; Mitchum, 407 U.S. at 242; McNeese, 373 U.S. 668; Monroe, 365 U.S. at 183; Wilbur, 53 F.3d at 544; Thomas, 807 F.2d at 454; Miofsky, 703 F.2d at 335.

The specific issue where there is confusion within the Circuits is the duty of a federal court to grant preliminary injunctive relief under Section 1983 to address a direct, immediate deprivation of federal constitutional rights, *prior* to granting Pullman deferral.

The Sixth Circuit requires a federal court to stay its hand and refrain from exercising its properly invoked jurisdiction, even though a facially unconstitutional state provision, which binds and affects member of the general public on free speech issues, is immediately and directly violating First Amendment rights.

This directly conflicts on this highly important issue with other Circuits which hold that a direct, immediate deprivation of constitutional rights by a facially invalid state provision should be addressed by preliminary injunctive relief before Pullman deferral is invoked.

As the Third Circuit has held, where a district court decides to abstain under Pullman, it is still "obliged to consider the grant of preliminary injunctive relief from harm pendente lite." Hotel & Restaurant Employees & Bartenders Int'l v. Danzenger, 709 F.2d 815, 832 (3rd Cir. 1983). This is so because the doctrine of Pullman abstention,

> "requires retention of jurisdiction . . . for the obvious purpose of preserving the plaintiffs' choice of a forum for the vindication of federal rights clearly infringed by the state construction ultimately adopted."

New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Ed., 654 F.2d 868, 885 (3rd Cir. 1991). As such, preliminary injunctive relief may be necessary to immediately protect "an irreparable interference with the exercise of rights protected by [the First Amendment]." Id. at 886.

The Sixth Circuit rule goes the opposite, refusing immediate federal relief in favor of a state remedy.

The new Sixth Circuit requirement also collides with broad principles laid down by the Supreme Court:

> We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created . . To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.

McNeese, 373 U.S. at 673.

Moreover, this Court has specifically noted that Pullman abstention does not preclude preliminary injunctive relief during the pendency of he Pullman abstention. Harrison v. NAACP, 360 U.S. 167, 178-179 (1959); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 312 n.18 (1979).

Perhaps more than anywhere else, the area of First Amendment rights is one which cannot tolerate any lack of clarity.

It is respectfully submitted that the foregoing principles should be reduced to a clear and concrete rule: (1) requiring a federal court to address preliminary injunctive relief where there is a direct and immediate violation of constitutional rights from a facially invalid state provision, prior to invoking Pullman deferral; and (2) prohibiting Pullman deferral where there is a direct and immediate violation of constitutional rights from a facially invalid state provision, and no ambiguity or uncertain state law is presented.

The need for a clear, direct statement of the rule is particularly apt in the present case -- unfortunately, now a very common type of case. In the present situation, it has been more than three years since the § 1983 litigation was filed. This whole time Plaintiff and the general public have been stripped of their First Amendment rights to engage in peaceful expression on a public sidewalk. "It is too late in the day to ensure that this adjudication be expeditious, but that is hardly a reason to prolong it further still." Cuesnongle v. Ramos, 835 F.2d 1486, 1499 (1st Cir. 1987).

This type of inordinate delay has never been tolerated on the most important civil right: free speech under the First

Amendment.[9]

> [The principle] that abstention cannot be used simply to give the state courts the first opportunity to vindicate a federal claim . . . [has] particular significance when, as in this case, the attack upon the [provision] on its face is for repugnancy to the First Amendment. In such case, to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself chill the very constitutional right he seeks to protect.

Zwickler, 389 U.S. at 251-252.

> [T]his Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.

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[9] The Pullman doctrine has frequently been criticized for the delay it causes.

> As a result of this doctrine, individual litigants have been shuffled back-and-forth between state and federal courts, and cases have been dragged out over [lengthy] periods. Id. at 424. Professor Charles A. Wright described the results that occurred when this doctrine was applied to a suit to enjoin the enforcement of a state statute restricting the rights of state employees to join unions: "after five years of litigation, including two trips to the Supreme Court of the United States and two to the highest state court, the parties still had failed to obtain a decision on the merits of the statute".

England, 375 U.S. at 425-426 (concurring opinion)(footnote omitted).

The U.S. Supreme Court should not allow this new extension of Pullman which, because it is fundamentally unprincipled, will totally discredit the doctrine and consume the rule.

Mitchum, 407 U.S. at 242 (citing Ex parte Young, 209 U.S. 123 (1908); Truax v. Raich, 239 U.S. 33 (1915); Dombrowski v. Pfister, 380 U.S. 479 (1965)).

Persons falling under the ambit of the Sixth Circuit's new Pullman rule who are being subjected to an immediate violation of their constitutional rights by a facially invalid state provision must now await a ruling by a state court before proceeding in federal court, while persons in other Circuits remain entitled to proceed directly in federal court. This conflict warrants certiorari because the Sixth Circuit rule undermines the *raison d'etre* of § 1983 protection.

IV. THE PETITION FOR CERTIORARI SHOULD BE GRANTED TO DIRECTLY ADDRESS AND RESOLVE THE QUESTION OF WHETHER DUE PROCESS PROHIBITS A COURT FROM ENTERING AN INJUNCTION THAT EXPRESSLY BINDS THE ENTIRE WORLD.

The pea underneath all of the mattresses which is causing injury in this case is an injunction which expressly binds the entire world. Over the last decade there have been an explosion of such injunctions by state court judges.

May a state court ever enter such an injunction, particularly where its subject matter is the prohibition of lawful and protected free speech under the First Amendment? This Court has articulated that such an injunction would violate "established principals of equity, jurisdiction, and procedure".[10]

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[10] Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 437 (1934) (recognizing that "by extending the injunction to 'all persons to whom notice of the injunction should come,' the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law."); See also, Martin v. Wilks, 490 U.S. 755, 761-762 (1989); Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-833 (2nd

What has never been made clear by this Court is "whether this is a constitutional rule, or simply a basic, equitable principal." McKusick v. City of Melbourne, Fla., 96 F.3d 478, 490 n.5 (11th Cir. 1996).

The recent frustration by state court judges with picketing "problems" has lead to the use of a meat ax instead of a scalpel through these types of injunctions which expressly bind all the world and simply close public sidewalks entirely to expressive activity. The area of First Amendment freedoms is too important to abide this ever-increasing practice. Certiorari should be granted for this Court to state clearly and unambiguously that due process does not permit a court to enter an injunction binding the entire world.

V. THE PETITION SHOULD BE GRANTED TO RESOLVE THE QUESTION, IMPLICITLY RESERVED IN MADSEN V. WOMENS HEALTH CENTER, INC., 512 U.S. 753 (1994), TO WIT: SHOULD AN INJUNCTION WHICH BY ITS EXPRESS TERMS BINDS THE ENTIRE WORLD BE TREATED AND ANALYZED IN THE SAME MANNER AS A STATUTE?

"There is a significant difference between an unconstitutional statute or ordinance and an injunction. According to the United States Supreme Court, one may violate an unconstitutional statute or ordinance at will and later challenge its unconstitutionality. See Shuttlewsorth v. City of Birmingham, 394 U.S. 147 (1969). Any fine or conviction levied for the violation will be null and void *ab initio* once the law is ruled unconstitutional. However, if

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Cir. 1930) (A court "cannot lawfully enjoin the world at large").

> one is found in contempt of violating an injunction that is later ruled unconstitutional, the contempt finding and punishment remain. See, Walker v. Birmingham, 388 U.S. 307 (1967). This is known as the collateral bar rule. Simply put, a party subject to a court order must obey it or face contempt. The court order must be respected until it is later vacated or declared unconstitutional."

M. Staver, *Balancing Federal Court Intervention*, Oklahoma City University Law Review, Vol. 22, p. 1143, at p. 1196 (1997).

In Madsen, an attempt was made to present the issue of whether an injunction which binds the world should be analyzed as a statute. The Madsen injunction, however, did not in fact contain such language. It merely had been arguably construed as such. Therefore, this Court was unable to reach that critical and significant question.

Here, the subject injunction squarely presents the issue. It is one of the ever-increasing injunctions being entered by the lower courts (particularly state courts) expressly binding the entire world -- entirely closing traditional public forums (usually sidewalks) from all expressive activity, even lawful and peaceful expression by the general public. Even under the revised test articulated in Madsen, there is a significant difference between analysis of the constitutionality of an injunction versus a statute. Certiorari should be granted in the present case to answer the question of the proper standard of review in these ever-frequent circumstances where the injunction is expressly drafted to operate not as an injunction -- binding on the parties, their representatives, and privies; but as a statutory enactment -- binding on all the world.

VI. THE PETITION SHOULD BE GRANTED TO RESOLVE THE QUESTION OF WHETHER THE RULE OF FRISBY V. SCHULTZ, ALLOWING CERTAIN COMPLETE BANS OF PROTEST ACTIVITIES IN RESIDENTIAL NEIGHBORHOODS, SHOULD BE EXTENDED TO NON-RESIDENTIAL SETTINGS.

In Frisby v. Schultz, 487 U.S. 474 (1988), this Court allowed a complete ban against picketing taking place directly in front of a single residence to be established by municipal ordinance. The Court cited "residential tranquility" as a major factor in its decision. The Court did not hold that such a ban could be sustained in a non-residential setting. It likewise did not address whether such a ban could be imposed through injunction, rather than legislation.

The instant case squarely presents those questions. The injunction here imposes a complete ban against all picketing on the sidewalks in a business district, not a residential neighborhood.[11] The ban was imposed by injunction, not through legislation.

This ban is directly at odds with U.S. v. Grace, 461 U.S. 171 (1983); Thornhill v. Alabama, 310 U.S. 88 (1940); and Carlson v. People of State of California, 310 U.S. 106 (1940). If Frisby was intended to overturn those cases, then such a dramatic change in constitutional law should come from the U.S. Supreme Court and not from a Circuit Court.

Certiorari should be granted to address those important questions: whether Frisby should be extended to non-residential

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[11] The banned area are the sidewalks adjacent to Lal's OB/GYN office in a strip-shopping center. The abortion clinic is at a different location. The state court banned picketing entirely, even peaceful, lawful expression by the general public, at the sidewalks adjacent to Dr. Lal's OB/GYN office where he sees and counsels patients who are considering abortions.

settings; and, whether Frisby bans may be imposed by injunction, rather than legislation.

CONCLUSION

This case presents a question of exceptional importance — may Pullman abstention and deferral be expanded to require exhaustion of state judicial remedies in cases which present no ambiguity or unclear issue of state law, on the ground that state court judges are "equal to the task" with the federal courts of protecting federal constitutional rights.

The Sixth Circuit Opinion below dictates that Pullman abstention be applied, exhaustion of state remedies invoked, and a stay of federal proceedings imposed, even though:

- the challenged provision is unconstitutional on its face, in violation of the First Amendment;
- the unconstitutional provision is neither ambiguous, nor unclear, and presents no state law question;
- the challengers are not parties to any ongoing administrative proceeding, litigation or otherwise; and,
- the United States Congress has given a federal right to proceed directly and immediately into Federal Court for protection of federal civil rights under the United States Constitution.

If the opinion below is allowed to stand, Holly Gottfried will be forced to commence a new action in state court for a clear violation of her First Amendment rights, and the general public will be barred from seeking direct and immediate relief in federal court from a facially invalid state provision which deprives them

of their constitutional rights.

This new Pullman abstention invented by the Sixth Circuit conflicts with the rulings of other Circuits. It creates inter-circuit conflict in the area of abstention; in the area of exhaustion; and on the fundamental issue of § 1983 jurisdiction. The U.S. Supreme Court has carefully crafted and outlined the bounds of abstention. If those bounds are going to be as dramatically changed as the Sixth Circuit has now done, that change should come from the U.S. Supreme Court.

Due to the extreme ramifications of the Sixth Circuit Opinion, which drastically conflicts with established law of this Court and of other Circuits, this Court should grant Holly Gottfried's petition for certiorari.

Respectfully submitted,



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APPENDIX A

Opinion of the United States Court of Appeals
for the Sixth Circuit, filed April 16, 1998

142 F.3d 326

Holly GOTTFRIED, Plaintiff-Appellant,

v.

MEDICAL PLANNING SERVICES, INC.; Offices of Manohar Lal, M.D.; Manohar Lal, M.D.; County of Summit, Ohio; Summit County Sheriff Richard Warren; and The Honorable Jane Bond, Judge of the Summit County Court of Common Pleas, Defendants-Appellees.

No. 97-3076.

United States Court of Appeals,
Sixth Circuit.

Argued March 19, 1998.

Decided April 16, 1998.

Rehearing and Suggestion for Rehearing En Banc Denies July 10, 1998.

*327 Patrick J. Perotti (argued), Susan E. Rusnak (briefed), Dworken & Bernstein, Painesville, OH, for Holly Gottfried.

Robert M. Gippin (argued), Karen Grasso (briefed), Daniel M. McIntyre (briefed), Buckingham, Doolittle & Burroughs, Akron, OH, for Medical Planning Services, Inc., Manohar Offices of Manohar Lal, M.D., and Manohar Lal.

Allyson L. Miller-Leonard (argued), Christopher Carl Esker (briefed), Summit County Prosecutor'S Office, Akron, OH, for Summit County, Richard Warren, and Honorable Jane Bond.

*328 Before: MARTIN, Chief Judge; MERRITT and CLAY, Circuit Judges.

OPINION

MERRITT, Circuit Judge.

Plaintiff Holly Gottfried wants to picket the home, OB/GYN office, and abortion clinic of a physician in Akron, Ohio, but a state court injunction, entered twelve years ago, restricts her right to do so. Rather than disobey the injunction and risk contempt or imprisonment, she brought the present action under 42 U.S.C. § 1983, asking the federal District Court to strike the state court's injunction as unconstitutional under the First Amendment. The District Court dismissed her case for reasons of comity and federalism. She now asks us to reverse that decision. Because we conclude Gottfried should have first asked the state court to modify its injunction in light of her constitutional claims before having the federal court adjudicate her constitutional claims, we affirm the District Court's decision to abstain with some minor procedural modifications.

I.

The salient facts are undisputed. In 1985, Dr. Manohar Lal, his OB/GYN office, and his abortion clinic, Medical Planning Services, sued for and obtained a permanent injunction against the protest activities of certain anti- abortion organizations and two "Does." Judge James P. Winter of the Court of Common Pleas in Summit County, Ohio entered a permanent injunction on August 7, 1986. That injunction applies to the named and unnamed defendants, those acting in concert with them, and all other persons who have notice of the injunction. In pertinent part, it prohibits anyone from picketing at Dr. Lal's home and his OB/GYN office; it protects the doorways and driveways at Dr. Lal's clinic; it forbids "mass picketing or any other type of picketing ... which directly or indirectly interferes" with the business of the clinic; and it prevents more than four people from picketing on each of the sidewalks in front of and alongside the clinic. Because the parties consented to this injunction, it was not appealed.

Holly Gottfried was not a party to the state lawsuit supporting the injunction. She was only ten years old when it was entered. An anti-abortion activist, Gottfried wants to picket and distribute information at Dr. Lal's home, office, and clinic, but she fears she will be arrested if she does. On July 20, 1995, she filed this suit in federal court against Dr. Lal, his office, his clinic, the City of Akron, Akron Police Chief Larry Givens, Summit County, Summit County Sheriff Richard Warren, and Judge Jane Bond, the successor to Judge Winter on the Summit County Court of Common Pleas. Through 42 U.S.C. § 1983, Gottfried asserted violations of her constitutional rights of free speech, free press, peaceful assembly, association, free exercise of religion, due process, and equal protection under the United States and Ohio Constitutions. She asked the District Court to declare the injunction unconstitutional on its face or as applied and to enjoin the defendants from enforcing the challenged portions of the injunction against her. She also requested $200,000 in damages in addition to her costs and attorney's fees.

Dr. Lal, his office, and Medical Planning Services moved to dismiss Gottfried's complaint under the Anti-Injunction Act, Colorado River abstention, and the Rooker-Feldman doctrine. The District Court initially granted this motion without a hearing. Characterizing the case as presenting "an issue of federal-state comity that appears unique in its factual setting," the court determined that the Anti-Injunction Act, Colorado River abstention, and Rooker-Feldman did not bar Gottfried's federal suit. Nonetheless the court dismissed her case, reasoning that "if a non-party to a consent decree has standing to challenge a state court consent decree in an action brought pursuant to 42 U.S.C. § 1983, then actions in state court which are concluded by the entry of a consent decree will be of scant value and the concepts of comity between the federal and state courts will suffer." Gottfried then filed for postjudgment relief. The court reinstated her complaint and scheduled an evidentiary hearing, specifically reserving the jurisdictional issue. After the hearing, the court again dismissed the case "in the interest of state-federal comity" without ruling on the *329 constitutionality of the injunction.

Gottfried's appeal requires us to determine whether abstention was proper under these circumstances.

II.

Gottfried's lawsuit does not fit easily within any of the doctrines that limit federal jurisdiction. The District Court correctly found the Anti- Injunction Act does not prevent Gottfried from obtaining her desired relief. First enacted as part of the Judiciary Act of 1793, the Anti-Injunction Act is one of the oldest restrictions on the ability of federal courts to interfere with state courts. It provides, "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. But in Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), the Supreme Court established § 1983 as an expressly authorized exception to the act. Id. at 242-43, 92 S.Ct. at 2161-63. Gottfried's claims are all constitutional claims brought through § 1983, and thus they fall squarely within Mitchum 's exception to the Anti-Injunction Act. Furthermore, the Anti-Injunction Act does not bar federal lawsuits filed by individuals who, like Gottfried, were "strangers to the state court proceedings." County of Imperial, Cal. v. Munoz, 449 U.S. 54, 59-60, 101 S.Ct. 289, 293, 66 L.Ed.2d 258 (1980); Hale v. Bimco Trading Inc., 306 U.S. 375, 377-78, 59 S.Ct. 526, 526-27, 83 L.Ed. 771 (1939).

The District Court was also correct with respect to the abstention doctrines that restrict federal jurisdiction in cases parallel to pending state court proceedings. The abstention doctrine established by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), requires the target of an ongoing state prosecution to raise any and all constitutional claims as defenses to that action and prevents the state court defendant from filing a collateral federal action raising the same claims. Although the concerns underlying Younger--equity, comity, and "Our Federalism," id. at 43-45, 91 S.Ct. at 750-51--apply with equal

force in this case, Younger abstention does not apply because Gottfried has not violated the injunction and is not the target of a pending prosecution in state court. Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974). One could argue that the ongoing injunction is the equivalent of a pending state court action for purposes of Younger abstention. See, e.g., Hayse v. Wethington, 110 F.3d 18, 20-21 (6th Cir.1997); Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd., 542 F.2d 652, 653-54 (6th Cir.1976). Yet that argument only holds if the federal plaintiff is a party to the state court's injunction. As with the Anti-Injunction Act and the rules of preclusion, Younger abstention cannot apply to one like Gottfried who is a stranger to the state proceeding. Cf. Munoz, 449 U.S. at 59-60, 101 S.Ct. at 292-93; Richards v. Jefferson County, Ala., 517 U.S. 793, 796-800, 116 S.Ct. 1761, 1765-66, 135 L.Ed.2d 76 (1996).

The abstention doctrine established by Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), is similarly inapplicable. This doctrine is essentially a balancing test that federal courts use to decide when to abstain in civil cases out of deference to a parallel state proceeding. Five factors influence the decision: (1) which court first assumed jurisdiction over the res or property involved, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, (4) the order of filing for the state and federal actions, and (5) the presence of a federal question. Id. at 818-19, 96 S.Ct. at 1246-47; Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23, 25-26, 103 S.Ct. 927, 941-42, 74 L.Ed.2d 765 (1983). Certainly Colorado River 's policies of "conserv[ing] ... judicial resources" and "avoid[ing] duplicative litigation," 424 U.S. at 817, 96 S.Ct. at 1246, inform our decision in this case. But where, as here, there is no presently ongoing state proceeding parallel to the federal case, the exceptional circumstances necessary for Colorado River abstention do not exist. Baskin v. Bath Township Bd. of Zoning Appeals, 15 F.3d 569, 571-72 (6th Cir.1994).

*330 Likewise, the District Court rightly decided that the Rooker-Feldman doctrine does not apply here. Rooker-Feldman stands for the simple (yet nonetheless confusing) proposition that lower federal courts do not have jurisdiction to review a case litigated and decided in state court; only the United States Supreme Court has jurisdiction to correct state court judgments. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311-12, 75 L.Ed.2d 206 (1983); 28 U.S.C. § 1257. This is equally true in constitutional cases brought under § 1983, since federal courts must give "full faith and credit" to the judicial proceedings of state courts. 28 U.S.C. § 1738; Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85, 104 S.Ct. 892, 898, 79 L.Ed.2d 56 (1984); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 475-78, 102 S.Ct. 1883, 1894-96, 72 L.Ed.2d 262 (1982); Allen v. McCurry, 449 U.S. 90, 103-05, 101 S.Ct. 411, 419-21, 66 L.Ed.2d 308 (1980). These general principles are admittedly relevant to this case, but they do not directly govern. As we stated in United States v. Owens, 54 F.3d 271 (6th Cir.1995), "Clearly, a party cannot be said to be appealing a decision by a state court when it was not a party to the case. The Rooker-Feldman doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court." Id. at 274. Because Gottfried was not a party to the lawsuit underlying the state court injunction, Rooker-Feldman does not bar her case any more than res judicata and collateral estoppel do.

This discussion has shown that Gottfried's lawsuit does not precisely fit any of the jurisdictional doctrines normally applicable in cases like hers, even though the policies that typically restrict federal jurisdiction are present. In this case there is tension between the principles that justify abstention and the technical requirements for each of the doctrines discussed above. This tension derives from the fact that Gottfried was not a party to a state court injunction that nonetheless restricts her constitutional rights. Like the District Court, however, we are

concerned about the policies underlying abstention, not its precise limitations. Therefore, we should keep in mind the Supreme Court's recent advice that "[t]he various types of abstention are not rigid pigeonholes" but instead "reflect a complex of considerations designed to soften the tensions inherent" in a dual state-federal system of justice. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11-12 n. 9, 107 S.Ct. 1519, 1526-27 n. 9, 95 L.Ed.2d 1 (1987). Our analysis needs to proceed a little further in light of this admonition.

III.

A state court injunction broad enough to restrict the speech rights of those who were not parties to the underlying litigation raises as many problems of federal jurisdiction as constitutional difficulties. Such an injunction has many of the attributes of a state statute, binding all who have notice of it and subjecting those who violate its restrictions to arrest, contempt, and imprisonment. See Cheffer v. McGregor, 6 F.3d 705, 708 (11th Cir.1993) (treating a similar injunction like a criminal statute), vacated in light of the intervening decision in Madsen v. Women's Health Center, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), 41 F.3d 1422 (11th Cir.1994) (en banc) (per curiam). Treating an injunction like a statute, those who want to exercise their speech rights but do not wish to violate the injunction often file suit in federal court against a host of state and local officials for every imaginable constitutional violation, rather than simply asking the state judge who has ongoing jurisdiction over the matter for relief. This has become the pattern in today's litigious era, and it causes a host of problems that only multiply where, as here, the law has changed in the interim and a new state judge has inherited a permanent injunction drafted by a predecessor.

Under these circumstances, we believe equity, comity, and our federalist judicial system require the federal court to give the state judge the first chance to bring the injunction into compliance with constitutional law. The policies underlying the

abstention doctrine of Railroad Commission of Texas v. *331 Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), suggest this is the correct result. Pullman abstention is built upon the traditional avoidance of unnecessary constitutional decisions and the sovereign respect due to state courts. Id. at 500-01, 61 S.Ct. at 645-46. It requires a federal court, faced with a constitutional challenge to an uncertain state law, to defer the constitutional question and avoid a direct confrontation if a decision from the state court "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." Harrison v. NAACP, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959); see also Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306, 99 S.Ct. 2301, 2312-13, 60 L.Ed.2d 895 (1979). Recognizing that permanent injunctions are similar to legislation, we should proceed with caution, cognizant that "federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." Id. at 176, 79 S.Ct. at 1030. Instead, federal courts should abstain and give the state official who is primarily responsible for the enactment the first opportunity to consider the scope of the injunction and its constitutional ramifications. After all, the state court that entered the injunction is particularly well suited to decide this issue, especially where the constitutional claim is intertwined with the underlying injunction. Hayse, 110 F.3d at 21.

Opinions from the Seventh and Eleventh Circuits reinforce this conclusion. Hoover v. Wagner, 47 F.3d 845 (7th Cir.1995), involved a challenge to a state injunction against abortion protesting almost identical to the one at issue here. Chief Judge Posner, writing for the panel, dismissed the case for want of equity. He characterized the plaintiff's request for declaratory and injunctive relief against a state judge and a local police chief as "an insult to the judicial and law enforcement officials of Wisconsin, an interference with an ongoing state court proceeding, and an empty but potentially mischievous command

to these officials to avoid committing any errors in the enforcement of the injunction." Id. at 851. The court held that it would be an abuse of discretion for a federal district court to enjoin the enforcement of a state court injunction or to declare it unconstitutional in light of the principles of comity that animate our federalist judicial system. Id. The Eleventh Circuit recently followed Hoover 's reasoning in a constitutional challenge to a similar permanent injunction. In McKusick v. City of Melbourne, Fla., 96 F.3d 478 (11th Cir.1996), Judge Carnes concluded that granting declaratory and injunctive relief against such injunctions would pave the way for an endless succession of federal lawsuits. "This arrangement would thrust the federal court into an unseemly, repetitive, quasi-systematic, supervisory role over administration of the state court injunction, and it 'would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim ab initio.' " Id. at 488 (quoting O'Shea v. Littleton, 414 U.S. 488, 501, 94 S.Ct. 669, 678-79, 38 L.Ed.2d 674 (1974)).

Although the Seventh and Eleventh Circuits determined abstention is proper in these situations, both Hoover and McKusick recognized that a nonparty to a state court injunction who is wrongfully arrested for exercising his or her First Amendment rights would still have access to a number of federal remedies. Hoover, 47 F.3d at 851; McKusick, 96 F.3d at 489. A federal forum could protect such a person pursuant to Mitchum v. Foster 's exception to the Anti-Injunction Act, see 407 U.S. at 242-43, 92 S.Ct. at 2161-63; the exceptions to Younger abstention for bad-faith prosecutions, patently unconstitutional laws, and inadequate state forums, see 401 U.S. at 53-54, 45, 91 S.Ct. at 754-55, 751; and the exceptions to the preclusion rules when a state court proceeding did not provide a full and fair opportunity to litigate constitutional defenses, see Migra, 465 U.S. at 84, 104 S.Ct. at 897-98; Allen, 449 U.S. at 95, 101, 101 S.Ct. at 415, 418. These remedies are extremely important to those held in contempt of injunctions restricting political expression, because a contempt defendant generally cannot raise the unconstitutionality of the injunction as a defense in state

court. See Walker v. Birmingham, 388 U.S. 307, 315-21, 87 S.Ct. 1824, 1829-32, 18 L.Ed.2d *332 1210 (1967). However, as the Supreme Court stated in Walker, rather than risk arrest and imprisonment, the preferable option for a nonparty who questions the constitutional validity of a state court injunction is to ask the state court for relief from the injunction before disobeying it. Id. at 317-19, 87 S.Ct. at 1830-31. When this option was suggested at oral argument, Gottfried's counsel argued that such relief was unavailable to a nonparty challenging an injunction in Ohio. Recent Ohio case law shows otherwise. See Blair Associates Insurance Agency, Inc. v. Pompora, No. OT-97-032, slip op. , 1997 WL 669688, at *4 (Ohio Ct.App. Oct. 9, 1997), (observing that an original action in prohibition can be used to challenge an injunction which restricts the free speech of a nonparty). In addition, we assume Gottfried can request general declaratory relief from the injunction pursuant to Ohio Rev.Code §§ 2721.01-.15. See Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 574, 67 S.Ct. 1409, 1422-23, 91 L.Ed. 1666 (1947) (observing a declaratory judgment action is "substantially identical" to an action in prohibition to determine constitutionality).

Accordingly, we hold that a federal court should abstain when a nonparty to a state court injunction brings a First Amendment challenge to the injunction in federal court before requesting relief from the state court. The scope of the injunction and its continuing necessity under Ohio tort and property law are antecedent to, and the reason for, Gottfried's present complaint. The state court should therefore have the first opportunity to address any significant changes in the law that limit the injunction's proper scope, as it is required to do by Ohio law. In re Skrha, 98 Ohio App.3d 487, 648 N.E.2d 908, 914-15 (Ohio Ct.App.1994); Cleveland v. Ohio Dept. of Mental Health, 84 Ohio App.3d 769, 618 N.E.2d 244, 246-47 (Ohio Ct.App.1992). Abstention is the proper course here because the state court, unlike the federal court, can modify its injunction or narrowly construe it in light of any intervening legal developments. Giving the state court the first opportunity to reassess the

injunction in light of the Supreme Court's recent decisions in Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988),Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), and Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997), is the most efficient way to decide this case. It prevents parallel challenges to the same injunction from occurring, with the possibility of inconsistent judgments from the state and federal court. Compare Cheffer, 6 F.3d at 712 (striking injunction unconstitutional), with Operation Rescue v. Women's Health Center, 626 So.2d 664, 675-76 (Fla.1993) (upholding the same injunction), aff'd in part and rev'd in part by Madsen, 512 U.S. 753, 114 S.Ct. 2516; compare Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 302-03 (5th Cir.1979) (finding injunction unconstitutional), with NAACP v. Claiborne Hardware Co., 393 So.2d 1290, 1300-02 (Miss.1981) (upholding the same injunction), rev'd, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). It could also obviate the need for a federal court to decide whether some or all of the injunction is unconstitutional. See Rescue Army, 331 U.S. at 568-75, 67 S.Ct. at 1419-23. Furthermore, abstaining under these circumstance affords the Ohio courts the respect they are due as our equals in a federalist judicial system. See Juidice v. Vail, 430 U.S. 327, 335-36, 97 S.Ct. 1211, 1217-18, 51 L.Ed.2d 376 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 603- 04, 95 S.Ct. 1200, 1207-08, 43 L.Ed.2d 482 (1975). We have no reason to believe the Ohio courts are less qualified than we are to fairly address Gottfried's complaints under state and federal law. Hayse, 110 F.3d at 21; see also Harrison, 360 U.S. at 178, 79 S.Ct. at 1031 (refusing to assume that state courts "will not do their full duty in judging [state enactments] in light of state and federal constitutional requirements"); Hughes v. Lipscher, 906 F.2d 961, 967 (3d Cir.1990) (reaching the same conclusion after abstaining from a constitutional challenge to a state court administrative policy).

Although Gottfried properly invoked federal jurisdiction in this case, she should give the Court of Common Pleas in Summit

County, Ohio the first opportunity to address her complaints. Because there is not a direct appeal raising the same constitutional *333 issue currently pending in the state courts, as there was in Hoover, the District Court should have stayed, not dismissed, Gottfried's lawsuit pending the state court's assessment of the injunction. Growe v. Emison, 507 U.S. 25, 32 & n. 1, 113 S.Ct. 1075, 1080 & n. 1, 122 L.Ed.2d 388 (1993). Of course, abstention in this case "does not ... involve the abdication of federal jurisdiction, but only the postponement of its exercise." England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 416, 84 S.Ct. 461, 465, 11 L.Ed.2d 440 (1964). Gottfried will have two options once she presents her claims to the state court. If she freely and without reservation presents her constitutional concerns to the state court, litigates them there, and has them decided there, then she will forego her right to return to federal court; her only relief will be from the Ohio appellate courts and in review by the United States Supreme Court on certiorari. Id. at 419, 84 S.Ct. at 466-67. Her other option will be to notify the state court of her constitutional objections but to explicitly reserve federal jurisdiction over them should the state court decide that the injunction proscribes her actions. Migra, 465 U.S. at 85 n. 7, 104 S.Ct. at 898 n. 7; England, 375 U.S. at 421, 84 S.Ct. at 467-68; Government & Civic Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364, 366-67, 77 S.Ct. 838, 839, 1 L.Ed.2d 894 (1957). This latter option will protect her from the preclusive effects of the state proceeding, allowing her to return to federal court for determination of the merits of her constitutional claim after she exhausts her remedies in the state courts. See England, 375 U.S. at 416-17, 84 S.Ct. at 465-66.

The state court responsible for the injunction is familiar with local conditions and transportation patterns and is in a better position to accommodate Gottfried's constitutional rights through modification or narrow construction of its injunction. This result is more effective and less contentious than asking a federal court to enjoin a state court or to declare its injunctions unconstitutional. Even when there are no jurisdictional bars to

such extraordinary relief, a federal court should initially abstain and give due respect to the state court's ability to determine the scope of its injunctions within the constitutional framework. A state court, like a federal court, has a broad duty to avoid serious constitutional issues by interpreting the legal text at issue. We believe this result best accommodates our twin responsibilities of deferring unnecessary constitutional decisions and preventing avoidable conflict between the state and federal courts. The "scrupulous regard for the rightful independence of the state governments" that Justice Frankfurter urged in Pullman is all the more warranted now, a half- century later, given that state courts are equal to the task under our Constitution. See Pullman, 312 U.S. at 501, 61 S.Ct. at 645-46; Robb v. Connolly, 111 U.S. 624, 637, 4 S.Ct. 544, 551, 28 L.Ed. 542 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States ...; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof ... as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.' ").

For these reasons, we affirm the District Court's decision to abstain, but remand with instructions to reinstate Gottfried's action and stay any further proceedings pending resolution in the state courts.

APPENDIX B

Opinion of the United States District Court for the Northern District of Ohio, filed December 20, 1996.

FILED
96 DEC 20 AM 9:42
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Holly Gottfried,	)	
	)	
Plaintiff,	)	CASE NO. 5:95 CV 1569
	)	
vs.	)	JUDGEMENT ENTRY
	)	
Medical Planning Services, Inc., et al.,	)	
	)	
	)	
Defendants.	)	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above-captioned case is dismissed. Each party shall bear its own costs. Case closed.

David D. Dowd, Jr.
U.S. District Judge

FILED
96 DEC 20 AM 9:41
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Holly Gottfried,	)	
	)	
Plaintiff,	)	CASE NO. 5:95 CV 1569
	)	
vs.	)	MEMORANDUM OPINION
	)	(Including Findings of Fact
Medical Planning Services,	)	and Conclusions of Law)
Inc., et al.,	)	
	)	
Defendants.	)	

I. INTRODUCTION

This case is brought by a young woman, a student at Akron University, who seeks a judicial declaration by this federal court that a permanent injunction entered in a state action in 1986 limiting picketing by abortion foes at an abortion clinic in Akron and prohibiting picketing at the separate OB/GYN Office and residence of the abortion doctor violates her constitutional rights. The action sounds for jurisdictional purposes in 42 U.S.C. § 1983.[1]

[1] The challenged state court order is attached as Appendix 1.

II. THE REMEDY SOUGHT BY THE PLAINTIFF

The plaintiff has joined as defendants Medical Planning Services, Inc. (operator of the abortion clinic), Dr. Manohar Lal (the abortionist), Judge Jane Bond of the Common Pleas Court of Summit County, the County of Summit and Richard Warren (Sheriff of Summit County).

In this action, the plaintiff in her amended complaint, prays for the following relief:

WHEREFORE plaintiff respectfully prays that the Court:

a. Declare that the state court order is unconstitutional on its face because it violates the rights to freedom of speech, press, assembly, association, equal protection under the law, free exercise of religion, and the rights to due process and equal protection, all guaranteed to the plaintiff and others under the Constitution of the United States and Ohio;

b. Declare that the state court order is unconstitutional as applied or threatened to be applied to the activities of plaintiff described in of [sic] the Complaint, because it violates the plaintiff's right to freedom of speech, press, assembly, association, free exercise of religion, and the plaintiff's right to due process and equal protection, all guaranteed to the plaintiff under the Constitutions of the United States and Ohio;

c. Enjoin the defendants, their agents, servants, employees, and attorneys from enforcing the challenged provisions of the state court order against the plaintiff for her participation in the activities described in the Complaint;

d. Grant to plaintiff an award of compensatory damages in the amount of $100,000.00 and punitive damages in the amount of $100,000.00 against each defendant.

e. Grant to plaintiff an award of her costs incurred in this matter, including reasonable attorneys' fees and expenses; and,

f. Grant such other and further relief as this Court deems just and proper.

(Docket =21) (emphasis added).

III. PROCEDURAL BACKGROUND

The Court sustained the defendants' motion to dismiss the case in an opinion filed on December 21, 1995. The motion was sustained even though the Court rejected the applicability of the Anti-Injunction Statute, 28 U.S.C. § 2283, and questioned the applicability of Colorado River abstention and the Rooker-Feldman doctrine. (See Docket #35).

The plaintiff moved for the Court to reconsider. The Court granted the plaintiff's motion by an order published on February 13, 1996 and reopened the case while specifically reserving the issue of jurisdiction. (Docket #46).

The Court then conducted an evidentiary hearing over several days[2] and extended to the parties an opportunity to file post-hearing briefs complete with proposed fact findings. The case is now ripe for a decision.

IV. FINDINGS OF FACT

As a result of the evidentiary hearing, the court makes the following fact findings:

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[2] Hereafter, references to the transcripts of the two hearings shall be as follows:

"July 1 Tr. ___"

"August 6 Tr. ___"

A. The Parties

1. Plaintiff Holly Gottfried was born on November 6, 1976. The plaintiff is opposed to abortion. She resides in Akron, Ohio during the academic year while she attends the University of Akron and otherwise resides in Bucyrus, Ohio.

2. Defendant County of Summit is a charter county organized pursuant to a charter adopted on November 6, 1979.

3. Defendant Sheriff Richard Warren ("Sheriff Warren") is the Summit County Sheriff and is the chief law enforcement officer in the Summit County Sheriff's Department.

4. Defendant, the Honorable Jane Bond ("Judge Bond"), is a judge of the Summit County Court of Common Pleas. Judge Bond is the successor to the Honorable James Winter, who presided over the proceedings in Medical Planning Services, Inc. v. Tri-County Christian Community of Greater Akron, Summit County Common Pleas Case No. CV 85-1-0282, and who entered the State Court Order attached hereto as Appendix "1."

5. Defendant Medical Planning Services, Inc. ("MPS") is an Ohio corporation. MPS owns a medical clinic located at 1054 South Arlington Street, Akron, Ohio ("MPS Medical Clinic") at which abortions are performed. Adjacent to the MPS Medical Clinic are public walkways or sidewalks that may be used by and are accessible to the general public. Also adjacent to the MPS Medical Clinic is a parking lot.

6. Defendant Manohar Lal is a licensed obstetrician/gynecologist who performs abortions at the MPS Medical Clinic.

7. The Offices of Manohar Lal, M.D. ("OB/GYN Office") is a sole proprietorship at which Dr. Lal conducts his OB/GYN practice. The OB/GYN Office is located at 1623 State Road, Cuyahoga Falls, Ohio. Adjacent to the OB/GYN Office are public walkways or sidewalks that may be used by and are accessible to the general public. Also adjacent to the OB/GYN Office is a parking lot.

B. Prior States Judicial Proceedings Summarized

8. On January 30, 1985, MPS filed its complaint in Medical Planning Services, Inc. v. Tri-County Christian Community of Greater Akron, Summit County Common Pleas Case No. CV 85-1-0282. Said complaint sought preliminary and permanent injunctive relief with respect to certain anti-abortion protest activities. A copy of said complaint is attached hereto as Appendix "2." That Complaint was verified by Dr. Lal. Holly Gottfried was not a named party to that action.

9. On August 7, 1986 the Summit County Court of Common Pleas entered an agreed-upon permanent injunction ("the State Court Order") attached hereto as Appendix "1." That Permanent Injunction filed in the Summit County Court of Common Pleas, Winter, J., in Case No. CV 85-01-0292, is in the nature of a consent agreement fashioned by the parties to that action, and approved by the attorneys representing those parties, and thereafter accepted by the court.

10. The State Court Order prohibits plaintiff, and any other person having notice of the order, from engaging in any type of picketing on the public walkways or sidewalks adjacent to the OB/GYN Office of Dr. Lal at 1623 State Road or the personal residence of Dr. Lal.

11. The State Court Order also prohibits plaintiff, and any other person having notice of the order, from assembling

and associating to picket with more than 4 people on each of the two intersecting public sidewalks at the MPS Medical Clinic, even if that is done in a peaceful, lawful manner solely by persons not joined in the original lawsuit. (Answer of Medical Planning Defendants, ¶53.)

C. Positions of the Parties

12. Plaintiff Holly Gottfried is opposed to abortion and has stated that she desires and intends to peacefully picket and distribute literature about abortion and abortion alternatives on the public walkways and sidewalks adjacent to the MPS Medical Clinic, the OB/GYN Office and Dr. Lal's home.

13. The Medical Planning defendants or their employees and agents intend to enforce and will enforce the State Court Order. (Answer of Medical Planning Defendants, ¶ 21-22).

14. The Summit County Sheriff is required, by the terms of the State Court Order, to actively enforce it.

15. The Sheriff has enforced the State Court Order since it was entered, but the Sheriff does not specifically monitor or patrol the locations which are the subject of the State Court Order. The only times that the Sheriff has acted to enforce the State Court Order is when contacted by the Medical Planning Defendants or their representatives.

D. Picketing Activity Prior to the State Consent Decree

16. At the time that the State Court action was filed, there was mass picketing being conducted at the MPS Medical Clinic, which mass picketing involved as many as 200 to 400 participants. The picketers threatened Dr. Lal, his children, his staff, and persons entering or leaving the MPS Medical Clinic. The threats included that he and/or

his children would be killed. The clinic also received bomb threats. The picketers regularly blocked the access and egress to the MPS Medical Clinic, and entered on and filled the parking lot. The picketers also would prevent Dr. Lal and others from being able to enter and/or leave the building. August 6 Tr. 35-37, 41-44.

17. At the time of the filing of the State Court Action, there had been picketing at the OB/GYN Office on several occasions, involving as many as 20 picketers at a time. Further, the State Court defendants and others acting in concert with them had threatened mass picketing at the OB/GYN Office of the type already taking place at the MPS Medical Clinic. August 6 Tr. 37-38.

18. At the time of the filing of the State Court action, picketing was also taking place at Dr. Lal's private residence. On several occasions, 15-20 picketers would mass on the sidewalk directly outside of the residence. The picketers blocked the driveway and obstructed and delayed Dr. Lal's ability to leave the residence, even when Dr. Lal was leaving to attend to a patient in an emergency situation. There were confrontations between the picketers and Dr. Lal in his automobile when he attempted to drive out of the driveway. August 6 Tr. 37-39.

E. Conduct Subsequent to the Filing of the State Consent Decree

19. Abortion protests have continued to occur on a regular basis subsequent to the State Court Order at the MPS Medical Clinic. Those protests have included the use of signs, verbal comments directed at Dr. Lal, the staff and persons entering and exiting the MPS Medical Clinic. Picketing has also continued to occur, on occasion, at the OB/GYN Office and at Dr. Lal's personal residence. Stipulation ¶19; August 6 Tr. 43-44, 93, 118-122.

20. Despite the State Court Order's ban on pickets at both the MPS Medical Clinic and the OB/GYN Office, there are numerous alternative means by which anti-abortion protesters are able to, and have continued to, communicate their anti-abortion message at the OB/GYN Office and the personal residence. August 6, Tr. 66-67, 118-122.

21. Abortion protesters remain able, and have continued to communicate to Dr. Lal at the OB/GYN Office and at his personal residence by telephone and by mail. Exhibits W and X; August 6 Tr. 44-45, 66-67.

22. No one has ever been arrested for picketing in front of Dr. Lal's personal residence. The Court takes judicial notice of the decision of the Ohio Court of Appeals for Summit County in Medical Planning Services, Inc. v. Tri-County Christian Community of Greater Akron, 1992 WL 112583 (1992), which applied the instant injunction with respect to activities at the OB/GYN Office. August 6 Tr. 118-121.

23. There have continued to be threats directed at the MPS Medical Clinic, Dr. Lal and his staff including bomb threats and death threats. August 6 Tr. 64-68.

F. The Ob/Gyn Practice of Dr. Lal

24. Dr. Lal's practice at the OB/GYN Office includes a large number of women who are experiencing high risk pregnancies. August 6 Tr. 18.

25. Women who are pregnant or who are experiencing infertility can experience serious medical consequences, including bleeding, miscarriage and high blood pressure, as a result of the actions of protesters. The patients can experience serious mental distress and a loss of the confidence which is a necessary part of successfully

treating these patients. This is particularly true of high risk pregnancies. August 6 Tr. 18-23.

26. It would be difficult, if not impossible, for patients to choose to avoid the picketers if the picketers were in front of the OB/GYN Office. The described actions of protest would therefore pose a risk of injury to others, if the State Court Order were not in force. August 6 Tr. 24, 28-29.

27. Patients at the OB/GYN Office include pregnant women considering their pregnancy options. August 6 Tr. 18; 81. They receive counseling there about their pregnancy options. August 6 Tr. 81. Some of those women subsequently go to the MPS Medical Clinic for abortion. August 6 Tr. 81. Plaintiff desired to provide these women literature encouraging child-birth, so some of them would not abort their unborn child. July 1 Tr. 23; 32-33. However, Dr. Lal testified that such literature would interfere with his business, and would be a violation of the injunction which prohibits "directly or indirectly interfering with" Dr. Lal's business. Order, ¶ 2.

G. Additional Findings as to the Plaintiff

28. Before September 1994, plaintiff resided in Bucyrus, Ohio. She was a member of certain anti-abortion groups. Plaintiff participated in certain abortion protest activities including life chains along public roadways, a protest at the Ohio State House, and a protest at a hotel in Akron, Ohio during a convention. Plaintiff had never picketed at any abortion clinic, at the medical office of any obstetrician or gynecologist, or at any personal residence prior to moving to Akron in September 1994. Further, plaintiff had never taken any affirmative steps in order to so picket. July 1 Tr. 3-13, 43, 45-47, 143.

29. In September 1994, plaintiff moved from Bucyrus to Akron in order to attend the University of Akron as a freshman. During the first semester of her freshman year, plaintiff attended a few meetings of an anti-abortion group at the University. That group disbanded due to circumstances unrelated to this action. Plaintiff has not subsequently sought to join or otherwise associate herself with any other group in connection with her desire to express her anti-abortion beliefs. July 1 Tr. 12-14, 39-40, 51-52, 143-144, 146-147.

30. Plaintiff has stated that she now seeks to engage in sidewalk counseling as an effort to educate any person about a pregnancy situation, to inform a woman about her developing fetus and to inform her about alternatives to abortion. Sidewalk counseling as defined by plaintiff could occur at any place. For purposes of plaintiff's challenge to the State Court order, the sidewalk counseling which plaintiff has described includes standing or walking outside of one of three locations (the MPS Medical Clinic, the OB/GYN Office, or Dr. Lal's personal residence), carrying a sign, praying, handing out anti-abortion literature and talking to persons who would be in the area about Dr. Lal's abortion activities. This sidewalk counseling activity constitutes picketing under the State Court Order. Stipulation ¶ 11, July 1 Tr. 8-9, 44.

31. Plaintiff seeks to distribute certain printed materials concerning her beliefs about abortion while she pickets at the three locations. A sampling of these materials was introduced into evidence as Defendants' Exhibit F. Plaintiff has obtained these materials from her aunt. Plaintiff has never distributed any abortion-related information at the clinic, obstetrician or gynecologist's office, or at the personal residence of any provider of abortion-related services. July 1 Tr. 10.

32. Plaintiff does not herself write and/or publish any printed materials relating to her abortion protest activities.

33. Plaintiff was approximately ten years old at the time of the State Court action. Plaintiff is not a member of any of the entities that were plaintiffs in the action. Plaintiff states that she is not acting in concert with the original defendants. She is bound because she has actual notice of the Order. Stip.¶ 11-13; July 1 Tr. 28, 94.

34. Plaintiff testified that in September when she moved to Akron, she wanted to engage in picketing and she decided to picket Dr. Lal. The only abortion provider that she said she desired to picket was Dr. Lal although she was aware that there were other clinics and other abortion providers located in Akron. She stated "because specifically I want to go to Lal's. That's my whole-thing." Plaintiff has never considered passing out her abortion protest literature at the office of any other obstetrician or gynecologist other than Dr. Lal. Similarly, plaintiff has never considered distributing information in Dr. Lal's neighborhood. July 1 Tr. 16-17, 19-20, 41, 53-55, 124, 130, 138.

35. Plaintiff declared at trial that if she picketed at the OB/GYN Office, she would stand on the grass adjacent to the street. July 1 Tr. 22.

36. Plaintiff declared at trial that if she picketed at Dr. Lal's personal residence, she would stand on the sidewalk directly outside of the house. July 1 Tr. 26-27.

37. Plaintiff did not have actual knowledge about the State Court Order, or about any enforcement of the State Court Order at either the MPS Medical Clinic, the OB/GYN Office, or Dr. Lal's personal residence, but she was told that there was a court order, that she would be arrested if she went to the clinic, and that people had

been arrested. July 1 Tr. 20-22, 56-59, 65-67.

38. Plaintiff did not take any steps to obtain an actual copy of the State Court Order.

39. Plaintiff testified that she received a copy of the State Court Order afer she agreed to bring this action from the attorneys who contacted her to solicit her services as a plaintiff. However, plaintiff did not discuss what conduct was permitted under that State Court Order with her lawyers. July 1 Tr. 66-68, 70-71.

40. Plaintiff has never investigated what actual picketing goes on at the MPS Medical Clinic, although she is aware that there has been some picketing at the clinic. She testified that the State Court Order would prohibit her from going to the clinic to determine whether and what picketing actually occurs. July 1 Tr. 188.

41. Plaintiff does not personally know of anyone arrested at the OB/GYN Office or at the residence. While plaintiff now claims that she had heard of arrests and claims to have heard of people being held in contempt, she never made an effort to determine if this was accurate. July 1 Tr. 117-120, 151-152.

42. Plaintiff testified that if there was any chance that she would be arrested pursuant to the State Court Order, however remote, she could not afford to take any such risk. July 1 Tr. 97, 120, 188-190.

43. Plaintiff has never been summoned before Summit County Judge Jane Bond or retired Summit County Judge James Winter, and no Summit County official, agent or employee in any way ever prevented or detained plaintiff form any activity. July 1 Tr. 148-149.

44. Plaintiff is now an adult and has moved to this area to

attend college at University of Akron. Plaintiff is pro-life, and desires to picket to support her cause. She has never been arrested, charged or convicted of any criminal offense, nor with any breach or violation of any anti-picketing ordinance or order. Plaintiff has no intent physically to touch or harass anyone, to encroach on private property nor to physically block or obstruct access to any facility or anywhere else. July 1 Tr. 24-25. Plaintiff desires and intends to do nothing more than peacefully distribute literature and to engage in other free speech activities, including peaceful prayer, on the public sidewalks and public ways which are adjacent to the MPS Medical Clinic, the OB/GYN Office of Dr. Lal, and Dr. Lal's residence. Stip. ¶ 11.

45. The plaintiff contends that the picketing that she would do at these locations would be non-violent and peaceful. Stip. ¶ 11; August 6 Tr. 80; July 1 Tr. 27. It would not involve any loud noise or bullhorns, any improper conduct, blockading or obstructing, nor any harassment. Stip. ¶ 5; August 6 Tr. 80; 89; 105; July 1 Tr. 27. Plaintiff would peacefully pray, hold a small sign, and offer pamphlets and discussion to passers-by who are willing to listen. Stip. ¶ 11; July 1 Tr. 24. It would be performed solely on the public sidewalks adjacent to the MPS Medical Clinic, the public sidewalks adjacent to Dr. Lal's home, and the grassy walkway adjacent to the OB/GYN Office. Stip. ¶ 5.

H. The Initiation of the Lawsuit

46. Plaintiff was approached about bringing this lawsuit in 1994 by way of a telephone call from someone claiming to be a lawyer from the offices of Dworken & Bernstein Co., L.P.A. Plaintiff does not know how the firm of Dworken & Bernstein obtained her name. Plaintiff did not meet any member of that firm until the day of her deposition. July 1 Tr. 47-48, 51-52, 55-56, 60.

47. During that telephone call, plaintiff agreed to be a plaintiff in a lawsuit in federal court. At the time that Gottfried agreed to bring suit, she knew only that she would be suing an area doctor. She did not know about Dr. Lal, or about the Offices of Manohar Lal, M.D. She was never informed of the possibility of seeking relief in state court and was told that the suit had to be brought in federal court. July 1 Tr. 59-60, 186-187, 194-195.

48. Plaintiff still has no idea how her attorneys obtained her name. However, based upon representations by counsel for plaintiff, it is clear that her name was obtained from the Ohio Right to Life Society, for whom plaintiff's counsel also provides legal services. July 1 Tr. 59, 179.

49. After agreeing to serve as a plaintiff, plaintiff was not provided with any further information about the status of the lawsuit until she was sent a copy of the Verified Complaint. Plaintiff did not meet any of the lawyers in this action until her deposition. July 1 Tr. 68-69, 73, 186-187.

50. Plaintiff does not have an agreement to pay the attorney's firm for its time. Plaintiff claims to have an oral agreement with her attorneys that she will be responsible for the payment of filing fees and costs; however, plaintiff has not paid any of the costs in this action and does not claim to be indigent. July 1 Tr. 71-72, 184-187.

51. Plaintiff did not independently verify the information contained in the Verified Complaint. She did not actually sign the Verified Complaint in front of a notary. An unidentified person took the complaint "somewhere" for it to be notarized. July 1 Tr. 73-87.

52. Plaintiff did not sign the amended Verified Complaint but rather counsel for plaintiff simply attached the prior

signature page to the new document. Amended Verified Complaint, page following p. 18, July 1 Tr. 87.

V. THE RULING

By this action the plaintiff seeks a declaration that the picketing restraints in the 1986 State Court Order are unconstitutional. Such a declaration would likely result in renewed unrestrained and unsupervised picketing of a nature that eventually resulted in the initial proceeding leading to the State Court Order now under constitutional attack. If plaintiff's prayer for relief in terms of the unconstitutional declaration were to be granted, the immediate question that arises is: to which court, state or federal, will the governmental safety units and/or apparent victims of the unrestrained picketing by abortion foes be required to apply for judicial relief?

If perchance such relief is again sought in state court, will the federal courts again be summoned to the controversy by a litigant dissatisfied by the newly imposed judicial orders in state court?

As the Court understands the plaintiff's position, she is now and would be allowed in the future, absent being a party in the state action, to contest a state decree in such a scenario in federal court without the necessity of challenging the decree in state court. In the Court's view, such a scenario is unworkable in the context of state-federal comity.

As a consequence, the Court dismisses the plaintiff's case in the interest of state-federal comity concerns and will not rule on the constitutionality of the 1986 state court order under attack in this case.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

(* Appendix 1 and 2 to District Court Opinion omitted.)

APPENDIX C

Rehearing Opinion of the United States Court of Appeals for the Sixth Circuit, filed July 10, 1998.

97 - 3076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOLLY GOTTFRIED,	)	FILED
	)	JUL 10 1998
Plaintiff-Appellant,	)	LEONARD GREEN, Clerk
	)	
	)	ORDER
	)	
MEDICAL PLANNING	)	
SERVICES, INC., ET AL.,	)	
	)	

BEFORE: MARTIN, Chief Judge; MERRITT and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and the decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX D

Permanent Injunction entered by the Court of Common Pleas, Summit County, Ohio, on August 7, 1986.

FILED
AUG 7 3:20 PM '86
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEDICAL PLANNING SERVICES, INC.	)	CASE NO. CV 85-1-0292
	)	JUDGE WINTER
Plaintiff,	)	
--vs--.	)	
TRI-COUNTY CHRISTIAN COMMUNITY OF GREATER AKRON, et al.	)	PERMANENT INJUNCTION
Defendants.	)	

This cause came on for hearing upon the motion of Plaintiff for a permanent injunction. This Court finds that Plaintiff and Defendants North Coast Christian Community, Tri-County Christian Community of Greater Akron, Bruce Parley and Community of Believers, have entered into an agreement for the granting of a Permanent Injunction, which the Court hereby adopts as its order.

WHEREFORE, upon consideration thereof and for good cause shown, it is hereby ORDERED, ADJUDGED and DECREED that said Defendant, their officers, agents, member, employees, representatives, and any and all persons acting in concert or participation with them and all other persons to whom notice of this Order shall come, each and all, are hereby enjoined and restrained from the following acts or conduct:

1. Trespassing upon the premises located at 1054 South Arlington Street, Akron, Ohio, including the building in which Plaintiff's office is located, the walkway immediately adjacent to such building, the adjacent parking lot, and all entrances to said parking lot;

2. Engaging in, supporting, or assisting mass picketing or any other type of picketing (except for that which is permitted within specific limitations below) which directly or indirectly interferes with the operation of Plaintiff's business at 1054 South Arlington Street, Akron, Ohio;

3. Blocking access to or egress from Plaintiff's place of business, or in any way preventing any person or persons from entering or departing from the aforementioned premises, or picketing or standing on that portion of the sidewalks in front of and beside said premises over which a vehicle must pass to enter the parking lot adjacent to said premises;

4. Engaging in any acts of physical violence, harassment, verbal insults, abuse, intimidation, or any like or similar conduct toward any person or persons present at, entering, or departing from the aforementioned premises;

5. Threatening physical harm to Plaintiff or to any of its owners, officers, agents, employees, patients, suppliers, or to any other person or persons present at, entering, or departing from the aforementioned premises, or threatening to engage in any of the hereinabove described actions, regardless of whether such threats are made in person or communicated through means, such as over the telephone, or through the mail;

6. Causing, creating or suggesting the presence of impending physical violence to any person or property in or around the aforementioned premises, or to any person or property at the personal residence or other offices of Plaintiff, its owners, officers, agent, employees, patients, or suppliers; and/or

7. Engaging in any type of picketing, physical violence, harassment, verbal insults, abuse, intimidation, or any like or similar conduct, or threatening to engage in any such conduct, at the personal residence or other offices of Plaintiff, its owners, officers, agents, employees, patients, or suppliers.

It is FURTHER ORDERED, ADJUDGED and DECREED that the Sheriff of Summit County proceed forthwith to serve the Defendant and those acting in concert with them, with notice of the terms of this Permanent Injunction and to actively enforce compliance with its terms; and the Sheriff is directed to bring before the Court any person who, having notice of this Permanent Injunction, refuses to obey it, or who obstructs or interferes with the Sheriff in the discharge of his duties.

This Permanent Injunction shall remain in effect until dissolved by further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that nothing in this Permanent Injunction shall prohibit the peaceful, non-defamatory picketing by not more than (4) individuals on the sidewalk along South Arlington Street in front of the aforementioned premises, and four (4) individuals on the sidewalk along Reed Avenue beside the aforementioned premises at any one time, provided that the picketers do not situate their picketing as to create or give the appearance of creating a single band of picketers larger than four (4) in number, and nothing in this Permanent Injunction be displayed on the exterior and interior of Plaintiff's premises so that all persons may be on proper notice thereof and be governed thereby.

IT IS SO ORDERED, ADJUDGED AND DECREED.

_____

Judge James P. Winter

APPROVED:

_____

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